

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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4 RUTHELLEN HARRIS, individually  
5 and as personal representative of  
6 ROBERT JEAN HARRIS, HEATHER  
HARRIS, JAMIE HARRIS and GREG  
HARRIS,

No. C 10-4626 CW

ORDER DENYING WDS'  
MOTION FOR SUMMARY  
JUDGMENT, Docket  
No. 88, GRANTING  
COSTCO'S UNOPPOSED  
MOTION FOR SUMMARY  
JUDGMENT, Docket  
No. 90, and  
GRANTING COSTCO'S  
UNOPPOSED MOTION  
FOR PARTIAL  
SUMMARY JUDGMENT  
ON ITS CROSS  
COMPLAINT AS TO  
EXPRESS INDEMNITY,  
Docket No. 91.

7 Plaintiffs,

8 v.

9 COSTCO WHOLESALE CORPORATION,  
WAREHOUSE DEMO SERVICES, INC.,  
10 and DOES 1-100, inclusive,

11 Defendants.  
12 ===== /  
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14 This action arises from the death of Robert Jean Harris.

15 Plaintiffs have alleged that on June 5, 2010, Harris died after  
16 choking on a sample of tri-tip meat negligently prepared and  
17 served to him by Defendants at Costco Wholesale Corporation Store  
18 #422 in South San Francisco, California. Pursuant to California  
19 Code of Civil Procedure section 377.30, Plaintiff Ruthellen Harris  
20 is decedent's personal representative. Plaintiffs Ruthellen  
21 Harris, Heather Harris, Jamie Harris, and Greg Harris also sue  
22 individually as decedent's surviving spouse and children. See  
23 Cal. Civ. Proc. Code § 377.60. Plaintiffs' Second Amended  
24 Complaint names Warehouse Demo Services, Inc. (WDS) and Costco  
25 Wholesale Corporation as Defendants, and contains five causes of  
26 action: (1) "Wrongful Death - Negligence" against both Defendants;

1 (2) "Wrongful Death - Products Liability, Negligence" against both  
2 Defendants; (3) "Negligent Retention of an Independent Contractor"  
3 against Costco; (4) "Negligent Supervision" against Costco; and  
4 (5) "Survival Action" against both Defendants.

5 WDS moves for summary judgment as to the claims against it in  
6 the 2AC. Docket No. 88. WDS argues that Plaintiffs cannot  
7 establish that it owed a duty to the decedent, Robert Jean Harris,  
8 or that the duty, if any, was breached.

9 Defendant Costco Wholesale Corporation filed a separate  
10 motion for summary judgment or, in the alternative, for partial  
11 summary judgment. Docket No. 90. In its motion, Costco joined  
12 WDS's motion for summary judgment with respect to the first,  
13 second and fifth causes of action, asserting that neither WDS nor  
14 Costco owed a duty to Harris. As to the causes of action plead  
15 only against Costco, Costco asserted that Plaintiffs lacked  
16 evidence to support their third cause of action for negligent  
17 hiring and the fourth cause of action for negligent supervision of  
18 an independent contractor. Plaintiffs have not opposed the motion  
19 to the extent that Costco has argued that there is insufficient  
20 evidence to show negligent hiring or supervision.

21 Costco also moved for partial summary judgment on its Cross-  
22 Complaint against WDS, in which it asserts that the sole basis for  
23 liability against it arises from the decedent's consumption of a  
24 food sample prepared by a WDS employee, and that WDS is  
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1 contractually liable to Costco for any damages arising out of its  
2 work.<sup>1</sup> Docket No. 91. WDS has not opposed this motion.

3 Having considered all of the parties' submissions and oral  
4 argument, the Court denies WDS' and Costco's motions for summary  
5 judgment as to the first, second and fifth causes of action,  
6 grants Costco's unopposed motion for summary judgment as to the  
7 third and fourth causes of action, and grants Costco's unopposed  
8 motion for partial summary judgment on its Cross-Complaint against  
9 WDS.

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11 BACKGROUND

12 On June 5, 2010, WDS ran a food demonstration table that  
13 served Morton's tri-tip samples to customers at the Costco store  
14 where the incident at issue occurred.

15 Deanna Gehrett, a WDS employee, worked at the tri-tip  
16 demonstration table that day. Following instructions provided in  
17 the Product Information Form (PIF),<sup>2</sup> Gehrett cut the tri-tip into  
18 sample pieces that she said were approximately 1/8 to 1/4 inch  
19 thick and one by one inch in dimension. Declaration of Anthony  
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22 <sup>1</sup> Costco has alleged the following cross-claims against WDS:  
23 (1) express indemnity; (2) breach of contract; (3) contribution  
and (4) equitable indemnity.

24 <sup>2</sup> The PIF explained a series of steps to prepare the tri-tip  
25 and serve it in samples. It stated, in relevant part,

26 7. Cut meat across the grain into THIN STRIPS, 1/8 to  
27 1/4 inch thick.  
28 8. Cut thin strips into 1 inch by 1 inch pieces and  
serve. (DO NOT SERVE IN CHUNKS)

1 Label, Ex. 2, Gehrett Dep. at 17:3-20, 24:4-23; 27:3-6. The  
2 samples were served in a white paper cup with a toothpick. Id. at  
3 27:21-28:2. Gehrett testified that at that time she was preparing  
4 the samples, she understood it was important to cut the tri-tip  
5 samples according to the PIF to prevent a choking hazard. Id. at  
6 58:21-59:9. Tamika Grisez, also a WDS employee, testified that,  
7 based on the company's training, she was aware that if pieces were  
8 cut too large, they could present a choking hazard. Label Dec.,  
9 Ex. 14, Grisez Dep. at 27:3-11.

10  
11 At some point, while Gehrett was cleaning the table, Harris  
12 approached her in distress. Gehrett testified that, at that  
13 moment, the demonstration table had been free of tri-tip "on  
14 display" and "free of any demonstrations" for about five or ten  
15 minutes. Id. at 75:10-76:5. However, she also stated that they  
16 "had two tri-tips left," and that they had to clean up because  
17 they did not want their table to "look messy." Id. at 29:4-5.

18  
19 When Harris approached Gehrett, he did not speak, but pointed  
20 to his neck and chest, leading her to believe that he was either  
21 choking or having a heart attack. Label Dec., Ex. 2, Gehrett Dep.  
22 at 29:19-30:7. Off-duty firefighter Louis Arzave was also  
23 shopping at Costco at the time of the incident. He performed the  
24 Heimlich maneuver and other measures on Harris in an unsuccessful  
25 attempt to dislodge the blockage in his airway.

26  
27 Gehrett testified that she had not seen Harris before he  
28 approached her, id. at 76:3-5, and estimated that hundreds of tri-

1 tip samples had been served that day, id. at 65:17-18. Bystander  
2 Paula Ponce, however, testified that she heard Gehrett screaming  
3 that Harris was choking on a piece of steak.<sup>3</sup> Label Dec., Ex. 8,  
4 Paula Ponce Dep. at 57:12-22.

5 The South San Francisco Fire Department responded to the  
6 emergency and took over the efforts to save Harris. Testimony by  
7 Jeff Cochran, a paramedic and fire fighter with the department,  
8 provides some insight as to the nature of the food that blocked  
9 Harris' airway. Cochran first used a suction device called a  
10 Yaunker in an unsuccessful attempt to remove the item. Label  
11 Dec., Ex. 6, Cochran Dep. at 85:15-23. He was able to suction  
12 smaller pieces of chewed meat, id. at 26:21-24, but was unable to  
13 remove any meat larger than the suction tip. Id. at 85:6-14. The  
14 exterior diameter of the suction tip was about the diameter of  
15 Cochran's smallest finger, although he did not testify as to the  
16 size of his finger. Id. at 85:6-14. Thus, the inner diameter of  
17 the suction was smaller than his smallest finger. Id.  
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20 Next Cochran used a laryngoscope blade and magill forceps to  
21 clear Harris' airway. Id. at 26:24-27:24. In doing so, Cochran  
22 observed "a chewed piece of meat blocking [Harris'] airway  
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24 <sup>3</sup> Gehrett's statement is not excludable hearsay because it is  
25 an excited utterance or an admission by the opposing party's  
26 employee within the scope of her employment. Federal Rule of  
27 Evidence 801(d)(2)(D) (an out of court statement is not hearsay if  
28 it is "made by the [opposing] party's agent or employee on a  
matter within the scope of that relationship and while it  
existed.")

1 actually completely blocking the back of [his] mouth." Id. at  
2 27:1-5. Using the magill forceps, Cochran removed the piece of  
3 meat and set it on the ground. Id. at 29:10-16. He could not  
4 recall the size of the piece of meat. Id. at 17-21.

5 From a distance of about six to ten feet, Arzave observed the  
6 extracted meat on the ground for about ten seconds and identified  
7 it as a piece of tri-tip that looked "exactly like the piece of  
8 meat" that he had sampled five minutes earlier. Label Dec.,  
9 Ex. 6, Arzave Dep. at 61:2-62:2. Arazave also stated that he had  
10 sampled a larger than usual piece of tri-tip meat from the  
11 demonstration table. Id. at 39:7-12. He testified that the meat  
12 he sampled and the meat that was extracted from Harris was about  
13 three inches by one inch in size. Id. at 38:16-23. Neither piece  
14 of meat was a "tiny little square." Id. at 38:24-25. According  
15 to Arzave, the meat that Harris choked on looked "intact," and did  
16 not appear as though it had been chewed "forty times," or "worked  
17 over." Id. at 35:14-25. Although Arzave testified that he was  
18 not wearing glasses at the time and that he was nearsighted, he  
19 also stated that he did not require glasses to drive and that he  
20 needed glasses to read. Id. at 34:25-35:13.

21 Plaintiffs also submit expert evidence in support of their  
22 claims. Plaintiffs' food safety expert Jeff Nelken attested that  
23 he had attended thirty to forty food demonstration shows where  
24 tri-tip was served. He opined, based on his observations of tri-  
25 tip samples at food shows and Trader Joe's, and based on his  
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knowledge of the food-service industry's concern for serving safe food, that the standard of care in the food industry regarding tri-tip steak samples requires that samples be no larger than one inch by one inch wide, and that tri-tip steak samples that are larger than that standard create a potentially dangerous choking hazard. Nelken attested to his experience and education in detail. Defendants' objections, asserting that more concrete evidence, such as evidence demonstrating that the food shows concerned food safety, go to the weight of the evidence, rather than precluding the testimony's admissibility.

Plaintiffs' medical expert, Michael Jay Bresler, M.D., an emergency room physician, opined that had the tri-tip sample been the size required by the PIF instructions, the decedent would have been less likely to choke on the sample and the Heimlich maneuver would have been more likely to have dislodged the sample.

#### LEGAL STANDARD

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir. 1987).

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the court must regard as

1 true the opposing party's evidence, if supported by affidavits or  
2 other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg,  
3 815 F.2d at 1289. The court must draw all reasonable inferences  
4 in favor of the party against whom summary judgment is sought.  
5 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,  
6 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952  
7 F.2d 1551, 1558 (9th Cir. 1991).

8 Material facts which would preclude entry of summary judgment  
9 are those which, under applicable substantive law, may affect the  
10 outcome of the case. The substantive law will identify which  
11 facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S.  
12 242, 248 (1986).

14 DISCUSSION

15 Defendants first argue that, as a matter of law, they did not  
16 owe a duty to exercise reasonable care in serving food samples to  
17 Harris and other Costco customers. The Court rejected this  
18 argument in connection with the motion to dismiss Plaintiffs' 2AC.  
19 September 13, 2011 Order Denying Defendants' Motion to Dismiss.  
20 Plaintiffs have submitted expert evidence that an industry  
21 standard of care exists by which tri-tip samples are to be served  
22 in pieces no larger than one inch by one inch wide. A reasonable  
23 jury may rely on such evidence to find that WDS had a duty of care  
24 to serve samples according to that standard.

25 Defendants assert that there is no evidence that Harris  
26 consumed a tri-tip sample prepared by WDS. However, Arzave

1 testified that the food extracted from Harris appeared to be the  
2 same tri-trip that he had sampled minutes earlier. Although  
3 Arzave stated that he was "nearsighted," this goes to the weight  
4 of his testimony. A reasonable jury could rely on this testimony  
5 to find that Harris choked on meat prepared by WDS.

6 Plaintiffs have submitted evidence that supports a finding  
7 that breach of the industry standard occurred. Arzave stated that  
8 the piece of tri-tip that he sampled was larger than usual and  
9 that the meat extracted from Harris was approximately one inch by  
10 three inches. This is evidence that the meat that Harris choked  
11 on was larger than the sample size that WDS employees were  
12 instructed to prepare. Based on this evidence, a jury could find  
13 that WDS did not serve a reasonably sized piece of meat.

14 The foreseeability of harm arising from a breach of the duty  
15 is supported by WDS employees' testimony regarding the safety  
16 risk, as well as Nelken's and Bresler's expert opinions.

17 Finally, Defendants contend that they may not be held liable  
18 because Harris should have chewed his meat. Defendants assert  
19 that California Civil Code section 1714(a)<sup>4</sup> demonstrates that

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4 The provision states, in relevant part,

Everyone is responsible, not only for the result of  
his or her willful acts, but also for an injury  
occasioned to another by his or her want of ordinary  
care or skill in the management of his or her property  
or person, except so far as the latter has, willfully  
or by want of ordinary care, brought the injury upon  
himself or herself.

1 decedent's failure to exercise ordinary care in sufficiently  
2 chewing the sample, shields them from liability for any negligence  
3 they have committed. Essentially, Defendants assert that section  
4 1714(a) establishes a rule of contributory negligence as an  
5 available defense. Under such a rule, contributory negligence "is  
6 conduct on the part of the plaintiff which falls below the  
7 standard to which he should conform for his own protection, and  
8 which is a legally contributing cause cooperating with the  
9 negligence of the defendant in bringing about the plaintiff's  
10 harm . . . Except where the defendant has the last clear chance,  
11 the plaintiff's contributory negligence bars recovery against a  
12 defendant whose negligent conduct would otherwise make him liable  
13 to the plaintiff for the harm sustained by him." Li v. Yellow Cab  
14 Co., 13 Cal. 3d 804, 809 (1975) (quoting Rest. 2d Torts §§ 463 and  
15 467).  
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17 In Li, the California Supreme Court found that, when section  
18 1714 was enacted in 1872, it adopted the rule of contributory  
19 negligence mitigated by the doctrine of last clear chance. Id. at  
20 819-20. However, the court further determined that the  
21 legislature did not intend to restrict courts from developing  
22 negligence concepts according to evolving standards of duty,  
23 causation, and liability. Id. at 821-22. Accordingly, the court  
24 discarded the rule of contributory negligence as a complete  
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26 Cal. Civ. Code § 1714(a).  
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1 defense, and adopted the doctrine of comparative negligence,  
2 assessing liability in direct proportion to fault. Id. at 827.

3 Summary judgment in favor of Defendants as to Plaintiffs'  
4 first, second and fifth causes of action is unwarranted.

5 CONCLUSION

6 The Court denies WDS' and Costco's joint motions for summary  
7 judgment with respect to the negligence claims alleged against  
8 both companies. Docket Nos. 88 and 90. The Court, however,  
9 grants Costco's unopposed motion for summary adjudication of  
10 Plaintiffs' third cause of action for negligent hiring and fourth  
11 cause of action for negligent supervision of an independent  
12 contractor. Docket No. 90. The Court also grants Costco's  
13 unopposed motion for partial summary judgment as to its crossclaim  
14 against WDS for express indemnity. Docket No. 91.

15 Plaintiffs conceded at the April 5, 2012 hearing that they  
16 have no remaining cause of action against Costco.

17 The Court will hold a final pretrial conference for this  
18 action on May 23, 2012 at 2:00 pm. Costco must address how or  
19 whether it wishes to proceed on its crossclaims against WDS. An  
20 eight day jury trial will commence on June 4, 2012. The Court  
21 will not be in session on June 12 or 13, 2012.

22 The parties are to schedule a mediation with the private  
23 mediator of their choice at the earliest available date. The  
24 parties shall submit confirmation to the Court that they have  
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1 scheduled the mediation. In addition, the parties shall confirm  
2 that they attended the mediation.

3 IT IS SO ORDERED.

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5 Dated: 4/11/2012  
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CLAUDIA WILKEN  
United States District Judge